APPENDIX A

OPINION OF SUPREME COURT OF OHIO
166 O. S. 254, 141 N. E. (2d) 465

SUPREME COURT OF OHIO

No. 34916

KECO INDUSTRIES, INC., ET AL.,

Appellees,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE CO.,

Appellant.

(No. 34916—Decided March 27, 1957)

Appeal from the Court of Appeals for Hamilton County

1. Where the General Assembly provides a complete and comprehensive statutory plan for th fixing by the Public Utilities Commission of the rates which may be charged by a public utility and vests the authority to review such rates exclusively in the Supreme Court of Ohio, such plan supplants and governs to the exclusion of any prior nonstatutory law on the subject unless there is a clear legislative intention expressed or necessarily implied that the statutory provisions are merely cumulative.

2. Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right

of action for restitution of the increase in charges collected during the pendency of the appeal.

This cause arose as a result of certain rate litigation involving the appellant. In 1952, appellant made application to the Public Utilities Commission for an increase in its rates, and after due hearing and consideration the commission allowed the application. Upon appeal to the Supreme Court from such allowance, it was held (*City of Cincinnati* v. *Public Utilities Commission*, 161 Ohio St., 395, 11 N. E. [2d], 619) that the commission's order was unreasonable and unlawful on the basis that the formula adopted by the commission in determining the rates was erroneous in that the rate base included certain improper items. On May 25, 1954, the court issued its mandate remanding the cause for further proceedings, and on June 4, 1954, the commission issued its order reducing the rates of the appellant. During the pendency of the appeal from the order of the commission, the appellant had collected the increased rates allowed by the commission in its original order.

After the finding by the Supreme Court, appellee instituted this action for an accounting and restitution, seeking to recover, on the theory of unjust enrichment, the difference between the original rates set on May 28, 1953, and the rates approved in the June 4, 1954, order, in an amount of at least $1,653,334.

A demurrer to the second amended petition of the appellee was sustained on the grounds that it failed to state a cause of action and that the court had no jurisdiction of the subject of the action, and the third amended petition was stricken on the ground that it failed to remedy the defect as to which the demurrers were sustained.

Appendix A

On appeal to the Court of Appeals the judgment of the trial court was reversed, and the cause was remanded.

The cause is before this court pursuant to the allowance of a motion to certify the record.

MESSRS. PAXTON & SEASONGOOD, MESSRS. STEER, STRAUSS & ADAIR, MR. JOSEPH A. SEGAL, MR. LEONARD S. MERANUS AND MR. ROBERT J. WHITE, *for Appellees.*

MESSRS. FROST & JACOBS, MR. CHARLES G. PUCHTA, JR., AND MR. A. J. ALLEN, JR., *for Appellant.*

MATTHIAS, J.

The question presented by this appeal is whether an action for restitution based on the ground of unjust enrichment lies to recover the increase in rates charged by a public utility under an order of the Public Utilities Commission, where such order is subsequently reversed by the Supreme Court on the ground that it is unreasonable and unlawful.

Restitution, on the basis of unjust enrichment, is a common-law remedy designed to prevent one from retaining property to which he is not justly entitled.

Although the remedy of restitution is recognized in Ohio, the problem before us is whether that remedy is available in the present case, or whether such remedy, in relation to the present situation, has been abrogated either directly or indirectly by statute.

To determine this, we must first examine the statutes relating to public utilities.

There is perhaps no field of business subject to greater statutory and governmental control than that of the public utility. This is particularly true of the rates of a public utility. Such rates are set and regulated by a general statutory plan in which the Public Utilities Commission is vested

with the authority to determine rates in the first instance, and in which the authority to review such rates is vested exclusively in the Supreme Court by Section 4903.12, Revised Code, which reads as follows:

> "No court other than the Supreme Court shall have power to review, suspend, or delay any order made by the Public Utilities Commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the Supreme Court."

Thus at the outset it is apparent that, if such action is held to lie, the effect will be to vest in a court other than the Supreme Court the authority to review the rates of a public utility, contrary to statutes.

Turning our attention, however, to the specific statute relating to orders of the commission concerning rates, we find Section 4903.16, Revised Code, which reads as follows:

> "A proceeding to reverse, vacate, or modify a final order rendered by the Public Utilities Commission does not stay execution of such order unless the Supreme Court or a judge there of in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the Supreme Court prescribes, with surety to the satisfaction of the Clerk of the Supreme Court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained."

From this section it is clear that the General Assembly intended that a public utility shall collect the rates set by the commission's order, giving, however, to any person who feels aggrieved by such order a right to secure a stay of the collection of the new rates after posting a bond.

Next we find Section 4905.32, Revised Code, which reads as follows:

> "No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the Public Utilities Commission which is in effect at the time.
>
> "No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service."

Under this section a utility has no option but to collect the rates set by the commission and is clearly forbidden to refund any part of the rates so collected.

A consideration of the above statutes clearly shows that it was the intention of the General Assembly to provide that utility rates are solely a matter for consideration by the Public Utilities Commission and the Supreme Court. The utility must collect the rates set by the commission, unless some one by affirmative act secures a stay of such order.

The question also arises as to the status of the rates set by the commission, during the pendency of the appeal. The only basis upon which plaintiff could recover would be that

such rates were excessive when collected. We have previously determined that under the statutes of Ohio the utility has no choice but to collect the rates set by the order of the commission, in the absence of a stay of execution pursuant to Section 4903.16, Revised Code. We have determined further that the General Assembly provided *that there is no automatic stay* of any order, but that it is necessary for any person aggrieved thereby to take affirmative action, and if he does so he is required to post bond.

In the present case we have rates which were established by the proper designated authority after a hearing and consideration in full compliance with the law, and, until such time as they were set aside by the Supreme Court, they were, in the absence of a stay, the lawful rates and the *only* ones which could be collected by the utility.

A similar situation was considered by the Supreme Court of Illinois in the case of *Mandel Brothers, Inc.* v. *Chicago Tunnel Terminal Co.*, 2 Ill. (2d), 205, 117 N. E. (2d), 774, in which it was said:

> "The fundamental issue in this case is whether a rate which has been approved by the Commerce Commission after a hearing as to its reasonableness can be termed an 'excessive' rate for the purpose of awarding reparations. We hold that it cannot, even though the rate approved by the commission has subsequently been set aside upon judicial review."

And as to the recovery of the excess in such rates it is said in 9 American Jurisprudence, 542, Section 175:

> "Where the charges collected by the carrier were based upon rates which had theretofore been established or approved by the public authority, the fact that such rates are subsequently reduced affords no right of action for damages or for the recovery of the dif-

ference between the old and new rates upon the ground that the prior rate was unreasonable, unless such right is conferred by the governing statute, as is held to be the case in some jurisdictions."

From the above consideration it is our conclusion that the rates of a public utility in Ohio are subject to a general statutory plan of regulation and collection; that any rates set by the Public Utilities Commission are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court; and that the General Assembly, by providing a method whereby such rates may be suspended until final determination as to their reasonableness or lawfulness by the Supreme Court, has completely abrogated the common-law remedy of restitution in such cases.

Common sense and reason lead us to a wholehearted endorsement of the conclusion, as is so well stated as follows in the opinion of Judge Hoy of the Hamilton County Court of Common Pleas:

"It may seem inequitable to permit the defendant to retain the difference in the rates collected under the May 28, 1953, order of the commission and the rates finally fixed by the commission on June 4, 1954, but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation, the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus,

while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation.

"In any event, a consideration of the applicable statutes and the authorities cited by counsel leads me to conclude that a rate fixing order of the Public Utilities Commission of Ohio stands on a different footing than the judgment or order of a court of law and that the common-law right of restitution is not available to the plaintiffs under the circumstances of this case."

Having determined that no cause of action exists in this case, it is unnecessary for the court to consider the question raised in relation to class actions.

Under the above determination, the Court of Common Pleas did not err in sustaining the demurrer to the second amended petition and in striking the third amended petition from the files. The judgment of the Court of Appeals is, therefore, reversed and that of the Court of Common Pleas affirmed.

JUDGMENT REVERSED.

WEYGANDT, C. J., ZIMMERMAN, STEWART, BELL, TAFT and HERBERT, JJ., CONCUR.

APPENDIX B

RULING OF COURT OF APPEALS FOR SIXTH APPELLATE DISTRICT

COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
TOLEDO 2, OHIO

Judges:
AMOS L. CONN, P.J.
CLYDE L. DEEDS
LEHR FESS

Toledo, Ohio,
June 6th,
1956.

Mr. Carl Frederick,
c/o Court of Appeals,
Cincinnati, Ohio.
Dear Mr. Frederick:

The following docket entries may be made at a time designated by your Court:

8054—Keco Industries, et al. v. The Cincinnati & Suburban Bell Telephone Co.

Finding on the record presented for review in the appeal on questions of law that error was committed in sustaining the demurrer of defendant-appellee to plaintiffs-appellants' second amended petition and in striking the third amended petition from the files and dismissing the action, the judgment of the court of common pleas is reversed and the cause is remanded to that court for further proceedings according to law.

Plaintiffs-appellants' assignments of error numbered 2 and 3 are considered not well taken, and same are overruled.

Appendix B

See journal entry to be approved by counsel and the court. No written opinion. Conn, Deeds and Fess, JJ. concur.

8151— • • •

Please advise us (by long distance telephone, if necessary) in advance of the date of release, so we may in turn publish them here.

The item in each entry providing for approval by "the court", of course means the Judges of this Court. Upon final approval of the journal entry in each case, the papers therein, together with the journal entry, will be sent to you.

Very truly,

/s/ AMOS L. CONN,
Presiding Judge.

APPENDIX C

OPINION OF COURT OF COMMON PLEAS ON DEFENDANT'S DEMURRER TO PLAINTIFFS' SECOND AMENDED PETITION

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-143254

KECO INDUSTRIES, INC.,
KNAPP BROTHERS MANUFACTURING COMPANY,
Plaintiffs,

v.

THE CINCINNATI & SUBURBAN BELL TELEPHONE COMPANY,
Defendant.

MEMORANDUM OPINION

Hoy, J.:

This case is before the Court on the demurrer of the defendant to plaintiffs' second amended petition, defendant contending that no cause of action is stated; that the Court does not have jurisdiction of the subject of the action and for improper joinder of parties plaintiff.

The second amended petition alleges in substance that the Public Utilities Commission of Ohio, pursuant to an application by the defendant, made an order on May 28, 1953 authorizing an increase in defendant's rates; that on June 1, 1953 the defendant increased its rates in accordance with said order; that on August 6, 1953 the Commission, after a re-hearing, affirmed its order of May 28th; that on May 12, 1954 the Supreme Court of Ohio, upon

consideration of appeals from said orders, found that the commission orders of May 28th and August 6, 1953, were unreasonable and unlawful in that certain taxes and expenses had been erroneously considered in determining the reasonableness of the increased rates and reversed such orders and remanded the matter to the Commission for further proceedings in accordance with the Court's opinion; that pursuant to the order of the Court, the Commission, on June 4, 1954 ordered a reduction in the defendant's rates and that on June 14, 1954 said rates were reduced in conformity to such order. The prayer of the second amended petition is for the recovery by plaintiffs and all other subscribers of the difference between the rates charged during the pendency of the appeal and the rates as finally fixed by the Commission on June 4, 1954.

The questions presented are as follows:

1. Is the common law remedy of restitution available to plaintiffs under the fact situation presented?
2. Are plaintiffs entitled to bring the act as a class suit?

The second question may be disposed of at once. If the plaintiffs are entitled to sue at all, they have a right to bring the action as a class suit for the situation presented falls clearly within the provisions of Section 2307.21 R. C., which is as follows:

> "*One or more may sue or defend for all.* When the question is one of common or general interest of many persons, or the parties are very numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

The plaintiffs and all other subscribers (alleged to be more than a quarter million) have a common interest in the questions raised, the subject matter, and the relief

sought and certainly it is impractical to bring them all before the Court. Accordingly, the demurrer cannot be sustained on the ground of improper joinder of parties plaintiff.

The first question, however, is much more difficult. The Court has examined the authorities cited in the especially well considered briefs submitted by each of the parties but can find no case, either in Ohio or elsewhere, which is squarely in point.

There is no doubt but that the common law right of restitution is available to recover what one has lost by the enforcement of a judicial order, finding or decree which is later set aside, even though an available right to a stay of execution was not exercised. But does a rate fixing order of the Public Utilities Commission stand on the same footing as the judgment of a Court of law? A clear distinction is made between the two by the Court in the case of *Mandel Bros.* v. *Chicago Terminal Company*, 2 Ill. (2d) 205, in which the Court holds that, unlike an ordinary judgment rendered by a Court of law, an order of a public utilities commission is legislative in character and that when such a commission, after hearing, establishes rates which it finds to be just and reasonable, such rates are the only rates that may be charged by a utility during the pendency of an appeal to the courts and that such rates may not, therefore, be declared to be excessive for the purpose of awarding reparations, even though the rates fixed by the Commission are subsequently set aside upon judicial review. I am quite aware that the Court in that case determined that the common law right of restitution had been superseded by statute in Illinois because, unlike Ohio, the Illinois Commission had power to order restitution, and the case is cited here only because it points out

that an order of the Commission is legislative in character and, therefore, stands on a different footing than the judgment of a Court insofar as restitution is concerned.

It must also be remembered that before restitution on the theory of unjust enrichment will be ordered, it must appear that such order will involve no violation or frustration of public policy either directly or indirectly. A consideration of the present Ohio Public Utility statutes and their legislative history leads one to infer, at least, that when the legislature divested the Commission of its former authority to order restitution and provided for a stay of execution under bond upon appeal, it intended to divest the Court of jurisdiction to grant the relief sought by plaintiffs herein.

The clear intent of Public Utilities legislation in this State has been to invest the Public Utilities Commission with exclusive jurisdiction over the fixing of rates and charges which may be collected by a Public Utility and to divest the Courts of such jurisdiction except upon appeal from orders of the Commission. The purpose of the legislature seems to have been to provide a means by which the public might be assured of fair, reasonable and uniform rates and charges for service on the one hand and on the other hand to protect the utility from a multiplicity of suits over rates in the various courts throughout the territory in which it operates. A clear illustration of this legislative intent may be found in Section 4903.12 R. C. (Section 549 G. C.) which provides in part:

> "No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. * * * "

The present law provides that a utility must file with the Public Utilities Commission a schedule of its rates and charges and, after approval thereof by the Commission, the utility may not charge any more nor any less than those set forth in such schedule; nor may it rebate any portion of the rates so charged and collected. Section 4905.32 R. C. (Section 614-18 G. C.) is as follows:

> "No public utilities shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.
>
> No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service."

Section 4905.99 Paragraph (C) R. C. provides a severe penalty for any violation of Section 4905.32 R. C.

Now, what were the effective rates that the defendant was required to charge during the pendency of the appeal from the Commission's rate fixing order of May 28, 1953? The answer to this question involves a consideration of Section 4903.16 R. C. (Section 548 G. C.) which is as follows:

> "A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme

court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained."

The obvious effect of this statute is that, in the absence of a stay of execution, the rates fixed in a Commission order shall, during the pendency of an appeal therefrom, be the effective rates and the only rates that a utility may lawfully charge and collect. Thus, the defendant was prohibited under the provisions of Section 4905.32 R. C. (Section 614-18 G. C.) from collecting any more or any less than, or from making any rebate from, the rates which it actually did collect between June 1, 1953 and June 14, 1954 while the appeal was pending.

Plaintiffs contend that Section 4903.16 R. C. (Section 548 G. C.) applies only to appeals by a utility and not to appeals by customers or others and that it would have been impossible for the City of Cincinnati, one of the appellants, to furnish bond. With this contention, however, I cannot agree for the statute plainly applies regardless of who the appellant is.

To further illustrate the difference between a judicial order and a commission order,—suppose that the defendant should desire to make a voluntary refund of the amount claimed by plaintiffs in this case. Would not such

refund violate the provisions of Section 4905.32 R. C. and subject it to the penalties of Section 4905.99? To go a step further,—suppose the defendant should petition this Court for authority to make such refund. Would this Court, in such event, have jurisdiction of the subject of the action? I think not and it seems that the same reasoning should apply when the action is brought by the customer. The Court has no jurisdiction either to permit or to order the defendant to violate the provisions of Section 4905.32 R. C.

It may seem inequitable to permit the defendant to retain the difference in the rates collected under the May 28, 1953 order of the Commission and the rates finally fixed by the Commission on June 4, 1954 but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation, the legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes a utility may not charge increased rates during proceedings before the Commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation.

In any event, a consideration of the applicable statutes and the authorities cited by counsel leads me to conclude that a rate fixing order of the Public Utilities Commission of Ohio stands on a different footing than the judgment or order of a Court of law and that the common law right

of restitution is not available to the plaintiffs under the circumstances of this case.

It follows that plaintiffs' second amended petition does not state facts constituting a cause of action nor does this Court have jurisdiction of the subject of such an action and that, for these reasons, the demurrer of the defendant must be sustained.

* * * * * * *

APPEARANCES:

Of Counsel:
PAXTON & SEASONGOOD,
SITZER, STRAUSS & ADAIR,

JOSEPH A. SEGAL,
ROBERT J. WHITE,
A. BRUCE SCHIMBERG,
Attorneys for Plaintiffs,

FROST & JACOBS,
Attorneys for Defendant.

March 30, 1955.

APPENDIX D

OPINION OF COURT OF COMMON PLEAS ON DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' THIRD AMENDED PETITION FROM FILES

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-143254

KECO INDUSTRIES, INC., and KNAPP BROTHERS MANUFACTURING COMPANY,

Plaintiffs.

v.

THE CINCINNATI AND SUBURBAN BELL TELEPHONE COMPANY,

Defendant.

MEMORANDUM OPINION

Hoy, J.:

This cause is before the Court on defendant's motion to strike plaintiffs' third amended petition from the files.

The Court has previously sustained a demurrer to plaintiffs' second amended petition upon two grounds, viz: That it did not set forth facts constituting a cause of action and that the Court was without jurisdiction of the

subject of the action. The only substantial difference between the second and third amended petitions is the inclusion in the latter of the following language:

> "and no remedy before the Public Utilities Commission of Ohio. If plaintiffs and other subscribers cannot recover in an action in this court the amounts collected from them by defendant pursuant to the Commission's unlawful and unreasonable orders of May 28 and August 6, 1953, plaintiffs and other subscribers would have no remedy for the recovery thereof and the denial of a remedy would constitute the deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 16 of the Constitution of the State of Ohio."

This language does not remedy the defects in the pleading to which the demurrer was sustained for it is purely a legal conclusion. It is merely an attempt to argue that if the Court correctly interpreted the applicable statutes when it sustained the demurrer to the previous pleading, then such statutes must necessarily be unconstitutional.

It is true that Courts are reluctant to entertain motions to strike pleadings as a whole, particularly where the pleading is susceptible of amendment by a statement of facts known to exist which constitutes a cause of action or a defense. However, a motion to strike an entire pleading may be considered as a motion to strike each of the component parts thereof and, if the Court granted defendant's motion only as to the new averments contained in the third amended petition on the ground that they are mere conclusions of the pleader, there would remain only the averments contained in the previous pleading.

Appendix D

Under these circumstances the Court finds that defendant's motion to strike the third amended petition is well taken and should be granted.

* * * * * * *

APPEARANCES:

FROST & JACOBS,
Attorneys for Defendant.

PAXTON & SEASONGOOD,
STEER, STRAUSS & ADAIR,
Attorneys for Plaintiffs.

June 1, 1955.

APPENDIX E

OPINION OF SUPREME COURT OF OHIO IN RATE CASE, CITY OF CINCINNATI v. P. U. C., 161 O. S. 395, 119 N. E. (2d) 619

CITY OF CINCINNATI,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF OHIO ET AL.,

Appellees. (Two cases.)

THE CINCINNATI RETAIL MERCHANTS ASSN.,

Appellant,

v.

PUBLIC UTILITIES COMMISSION OF OHIO ET AL.,

Appellees. (Two cases.)

SYLLABUS

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1. In an appeal from a final order of the Public Utilities Commission fixing rates for a telephone company, the court is ordinarily required, under Section 544, General Code (Section 4903.13, Revised Code), to reverse, vacate or modify such order as being unlawful or unreasonable, where the commission has abused its discretion by allowing the inclusion of improper items in the rate-base structure or has wrongfully allowed improper items to be included as recurring expenses in the company's operations.

2. Where a telephone company was not required to pay federal excess profits taxes, under the rates in effect on the day certain of July 1, 1952, and under a federal tax statute which was automatically scheduled to expire by its terms on June 30, 1953, and which actually did expire after

a limited extension on December 31, 1953, and where such company was only required to pay excess profits taxes beginning on June 1, 1953, in the total sum of $378,431, for the year 1953, because of an increase in rates allowed by the Public Utilities Commission and effective June 1, 1953, it is unlawful and unreasonable for the commission, on the company's application, to include an item of $647,026 for excess profits taxes as a recurring annual expense of the company.

3. The annual contributions of a telephone company to maintain a pension fund for its employees are a proper charge to be included in the company's operating expenses for rate-making purposes.

4. Contributions by a telephone company to the amortization of a deficiency in an "actuarial reserve" for the pension fund of its employees, to cover service of such employees rendered before such fund was put on an actuarial basis, are not a proper or legal charge to be included as a recurring annual operating expense in fixing telephone rates, where such "actuarial reserve" deficiency will be fully amortized over a period of ten years and within 18 months after the date certain fixed by the commission for rate-making purposes.

5. In fixing telephone rates, customers' contributions in the form of accruals for the payment of taxes, deposits to secure the payment of customers' bills for service or as advances on installation charges, and collections of rents to be paid at future dates, which will be constant with reasonable certainty in the foreseeable future and which are available for investments in materials and supplies, or for use as working capital, should be used as an offset on the allowance for working capital, including investments in materials and supplies necessary for the normal

operations of the company and for plant maintenance and repair.

6. The materials and supplies of a telephone company which will be used for new construction, extensions and additions, as distinguished from normal operations of the company and for plant maintenance and repair, are not property "used and useful for the service and convenience of the public," as required by Section 499-9, General Code (Section 4909.05, Revised Code), and the inclusion of the investments in such materials and supplies in the rate-base structure of the company is unlawful and unreasonable.

(Nos. 33701, 33742, 33702 and 33743—Decided May 12, 1954.)

APPEALS FROM THE PUBLIC UTILITIES COMMISSION

On September 12, 1952, The Cincinnati & Suburban Bell Telephone Company, hereinafter referred to as the company, filed an application with the Public Utilities Commission of Ohio for authority to increase its Ohio intrastate rates. Objections to the proposed increases were filed with the commission by the city of Cincinnati and The Cincinnati Retail Merchants Association, the appellants herein.

The cities of Hamilton and Norwood also entered appearances and objected to the proposed rates.

On May 28, 1953, after an extended hearing, which the appellants claim was not conducted in accordance with the mandatory provisions of Section 614-20, General Code, the commission entered an order approving the proposed rate increases in full (effective as of June 1, 1953). There-

after the commission granted and held a rehearing, and on August 6, 1953, it adhered to its order of May 28, 1953.

The city of Cincinnati perfected appeals to this court from both orders of the commission, which are designated as cases numbered 33701 and 33742, respectively, and The Cincinnati Retail Merchants Association likewise perfected appeals from both orders, as cases numbered 33702 and 33743, respectively.

The appeals of each appellant were consolidated by agreement and all appeals were argued to the court as one appeal.

The commission found that, as of July 1, 1952, which is the date certain on which the commission based its order, the company's Ohio intrastate property had a rate-base valuation of $89,980,384, computed on a reproduction cost new of $113,182,540 minus a depreciation reserve of $23,202,156. It found also that the proposed rates would produce an additional gross annual revenue from the company's Ohio intrastate operations, in the amount of $4,637,436.

The city of Cincinnati listed 22 items in its assignment of errors and The Cincinnati Retail Merchants Association's assignment contains 15 items. However only six issues were variously stressed in the briefs of the appellants and in the arguments to the court. These issues may be briefly summarized as follows:

1. Were federal excess profits taxes properly includable in the company's expenses?

2. Was the payment to reduce the unfunded actuarial reserve requirement under the company's pension plan properly includable in its expenses?

3. Should accruals on the company's books be deducted from its rate-base structure?

4. Was the commission's determination with respect to the amount of material and supplies properly includable in the company's rate-base structure?

5. Was the commission's determination with respect to rate of return either unlawful or unreasonable?

6. Was the procedure followed by the commission in its hearing and rehearing either unlawful or unreasonable?

Other facts are stated in the opinion.

MR. HENRY M. BRUESTLE, *city solicitor*, MR. JAMES W. FARRELL, JR., and MR. ROBERT J. WHITE, *for appellant city of Cincinnati.*

MESSRS. PAXTON AND SEASONGOOD, MR. JOSEPH A. SEGAL and MR. A. BRUCE SCHIMBERG, *for appellant The Cincinnati Retail Merchants Association.*

MR. C. WILLIAM O'NEILL, *attorney general*, MR. JAMES M. BURTCH, JR., and MR. EVERETT H. KRUEGER, JR., *for appellee Public Utilities Commission.*

MESSRS. FROST & JACOBS, MR. CHARLES G. PUCHTA, JR., MR. A. J. ALLEN, JR., and MR. GEORGE C. MCCONNAUGHEY, *for appellee Cincinnati & Suburban Bell Telephone Company.*

LAMNECK, J. Section 544, General Code (Section 4903.13, Revised Code), provides that "a final order made by the commission shall be reversed, vacated or modified by the Supreme Court on appeal, if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable."

This section has been construed as limiting the power of the court on review to a determination of whether the final order of the commission is supported by substantial evidence and is in accordance with the standards established by law.

Appendix E

In the case of *City of Marietta* v. *Public Utilities Commission*, 148 Ohio St., 173, 74 N. E. (2d), 74, the fourth paragraph of the syllabus reads as follows:

> "A court will not substitute its judgment as to the value of public utility property or as to the cost of production and distribution of public utility service for the finding of the commission on these matters and will not reverse the order of the commission thereon unless there is a clear showing that it has abused its discretion or has omitted to give just consideration to some element in the determination of the rate base structure or the rate of return which makes its finding unlawful or unreasonable."

The appellants' main contentions are that the commission erroneously allowed the inclusion of certain items in the company's recurring expenses as a basis for needed revenue, some of which items they contend are not properly includable and some of which they contend, if includable, are nonrecurring expenses and, therefore, are includable only when properly amortized over a period of years, and that certain other items were erroneously included in the rate-base structure.

First, the appellants contend that the commisson wrongfully allowed as a recurring annual legitimate expense an item of $647,026 for federal excess profits taxes.

Basically, a regulated public utility should not be entitled to earn profits that are excessive.

However, Sections 499-9 and 614-23, General Code (Sections 4909.05 and 4909.15, Revised Code), provide that, in fixing the valuation of a public utility's property used and useful for the service and convenience of the public, the

commission shall base its value on the cost of reproduction new as of a date certain minus depreciation, and that a utility is entitled to a fair and reasonable return on such valuation. It is conceivable that circumstances might exist where, in fixing rates which will produce a fair and reasonable return on such a valuation, revenues would be produced that would enable the utility to earn large profits based on the par value of its capital stock.

In *City of Cincinnati* v. *Public Utilities Commission*, 153 Ohio St., 56, 90 N. E. (2d), 681, this court held that "excess profits taxes paid by a utility to the federal government may be considered by the commission as an operating expense of the utility, particularly where no objection is registered thereto at the hearings before the commission."

In the instant case, however, strong objections were registered by the appellants, in the hearings before the commission, to the inclusion of any allowance of an item for excess profits taxes as a recurring expense of the company.

On July 1, 1952, which is the day certain in these cases, the company's earnings, under the rates then in effect, did not require it to pay federal excess profits taxes. The federal excess-profits-tax statute was automatically scheduled to expire by its terms on June 30, 1953, and, after a limited extension, it did actually expire on December 31, 1953. It was only through the increase in rates, allowed by the commission, that the company was required to pay any excess profits taxes and then only for a short period. This clearly was not a recurring expense to be included in the expenses of the company for rate-making purposes. It is the universal rule that nonrecurring expenses must be disallowed in their entirety or amortized over a reason-

able period. See *Hardin-Wyandot Lighting Co.* v. *Public Utilities Commission*, 108 Ohio St. 207, 215, 140 N. E., 779.

In *East Ohio Gas Co.* v. *Public Utilities Commission*, 133 Ohio St. 212, 226, 12 N. E. (2d), 765, it is stated that "it was the duty of the commission to consider not only the taxes actually assessed during the test period, but to compute what they would be after the test period in view of the change in laws."

Since the company was not required to pay federal excess profits taxes under its rates in effect on the day certain, July 1, 1952, was only required to pay excess profits taxes in the total sum of $38,431, by the increase in rates authorized by the commission on May 28, 1953, and is not required to pay any such taxes after December 31, 1953, it was unlawful and unreasonable for the commission to include as a recurring annual expense an item of $647,026 for excess profits taxes.

The company has had a pension plan for its employees since 1913. Its present annual current payment into this fund amounts to approximately a half million dollars. It is admitted that this annual payment is a proper charge to be included in operating expenses for rate-making purposes.

From 1913 until 1927, such pensions were handled on a pay-as-you-go basis. In 1927, a change was adopted to permit advance collections for pension payments on an actuarial basis. However the rates adopted at that time did not provide sufficient money for the payment of all pensions that might accrue, since many of the employees had accumulated service prior to the establishment of the pension fund. Beginning in 1941, the company made annual "freezing payments" of amounts equivalent to the interest on the unfunded actuarial reserve in order to ar-

rest its growth. Beginning in 1945, the company began amortizing the "unfunded actuarial reserve" deficiency to extend over a ten-year period. The 1952 "freezing payment" amounted to $15,493 and the 1953 payment amounted to $11,531.74. The annual amortization payment amounted to $241,647 for the year 1952, and a similar amount was payable in 1953. The "unfunded actuarial reserve" deficiency will be completely amortized by the payment of $104,336 due in 1954. The Ohio intrastate portion which the commission allowed as a recurring annual expense was $241,647.

The appellants in the proceedings before the commission contended that the annual payments to freeze the unfunded reserve and to establish a funded "actuarial reserve" for the pension fund are not proper or legal charges to be included in current operating expenses of the company. They contended also that if they are legal and proper charges to operating expenses, they are not recurring expense items since the unfunded reserve would become fully amortized by the payment of $104,336 in 1954. They contended that, at best, such expenses are nonrecurring, requiring amortization over a five-year period. The commission disregarded these contentions of the appellants and allowed the "freezing payments" and the full amount of $241,647 annually as recurring expenses. We agree with the contention of the appellants that the inclusion of $241,647 as an annual recurring expense for payment to a funded "actuarial reserve" is not a proper charge to be included as annual recurring operating expenses of the company for rate-making purposes, where the "unfunded actuarial reserve" will be fully amortized by the payment of $104,336 in 1954. It is the opinion of this court that the annual current payments into the pension fund are prop-

erly includable as recurring expenses but that the "freezing" and amortization payments made to the unfunded actuarial reserve pension fund should be excluded or amortized over a reasonable period.

The appellants also contend that the rate-base structure should be reduced by the amount of certain accruals, on the theory that they represent funds furnished by the customers that have either been invested in the company's plan or are used as working capital. The accruals, which the appellants contend should be deducted from the rate-base structure, include those which are applicable to the company's intrastate business and which are accrued for the payment of operating expenses and are of some permanency.

Four accrued accounts, classed as deductible by appellants, with the average monthly balances for 1952, are as follows:

1. No. 160	Customers' deposits	$ 63,320.00
2. No. 164	Advance billing and payments	551,039.00
3. No. 166	Taxes accrued	3,987,878.00
4. No. 167.03	Rents accrued	280.00

The company does not dispute that the accruals shown by these accounts, with the exception of account No. 164, advance billing and payments, were invested in plant or used as working capital on July 1, 1952, and that it started such a policy in 1948. It claims, however, that in fact it does not obtain any money from the advance billing and payments account. The record shows that customer billing remaining unpaid as of June 30, 1952, amounted to $2,628,149, which was more than $1,500,000 greater than the amount of advanced billings and payments of $1,102,078 on the same date. The commission found that the company had not obtained money from the advance billing

and payments account, which it has invested in plant or used as operating capital. We do not disagree with that finding.

Account number 160, customers' deposits, is fairly uniform and constant throughout the year and represents sums of money deposited with the company by its customers either to secure payment of their bills or as advanced payments on installation charges.

Account number 167.03, rents accrued, represents rents charged to monthly expenses, which are actually paid at a future date.

Account number 166, taxes accrued, represents accruals for taxes for federal, state and local purposes. Such taxes are collected from customers in monthly installments in advance and disbursed at considerably later dates. Tax accruals, which are constant and available with reasonable certainty in the foreseeable future to the company for investment in plant or working capital, as of July 1, 1952, approximated $3,500,000 per year.

The commission made no deduction for accruals in fixing the rate-base structure for the company.

In *Pittsburgh* v. *Public Utility Commission*, 370 Pa., 305, 88 A. (2d), 59, the Supreme Court of Pennsylvania held that it was reversible error for the commission in computing a rate base to "ignore the availability for cash working capital purposes of the amount collected and allocated for income tax purposes." In that case, on page 315, the following comment appears:

> "In the instant case in determining the need for cash working capital the commission adopted testimony of a 24-day lag in the receipt of payments for services rendered but in arriving at its conclusion completely ignored undisputed competent evidence

coming from the same source that either reduced or eliminated the need. This was not an exercise of judgment by the commission but an arbitrary and unreasonable finding."

In *Citizens Telephone Co.* v. *Public Service Commission*, 247 S. W. (2d), 510, the Kentucky Court of Appeals stated at page 513:

"In addition, the commission found that the company bills its customers in advance, and that the company accrues its taxes on a monthly basis. The tax accruals themselves would provide sufficient cash for working capital requirements. The investors have not contributed any money for working capital purposes. Under these circumstances, the commission did not act unreasonably or unlawfully in disallowing the working capital item."

In *Chicopee Mfg. Co.* v. *Public Service Commission*, 93 A. (2d), 820, 826, the New Hampshire Supreme Court stated:

"If it is true that the rate payers are in fact providing current funds to the company through prepayments for income taxes which may be held and paid out at a much later date by the company, a deduction of average income tax accruals from the working capital allowance may be proper. Where the rate payers provide such funds, it is not proper that the stockholders should be allowed a return on them by including them in the rate base."

In *Chesapeake & Potomac Telephone Co.* v. *Public Service Commission*, 201 Md., 170, 93 A. (2d), 249, the Maryland Court of Appeals stated at page 256:

Appendix E

> ". . . rates are calculated to yield a profit over and above taxes and the tax burden is shifted to the customers. Since these advance payments are available for current use until they become payable to the taxing authorities, there is no need to allow earnings upon a cash balance without regard to tax accruals. If allowed, there would be a duplication in a charge already made against the rate-payer."

The company admits that in certain jurisdictions tax accruals in excess of the utility's allowance for cash working capital and for materials and supplies are used to offset the allowance for cash for working capital and for materials and supplies.

We are of the opinion, and so hold, that customers' contributions in the form of accruals for the payment of taxes, deposits to secure the payment of customers' bills for services or as advances on installation charges, and collections for rents to be paid at future dates, which will be constant with reasonable certainty in the foreseeable future and which are available for working capital and for investment in materials and supplies, should be used to offset the rate-base allowance for working capital, including the investment in materials and supplies for the normal operations of the company and for plant maintenance and repair.

The commission included an item of $959,660 in the rate-base structure for working capital. This is the Ohio intrastate portion of a $1,250,000 working capital developed for the company as a whole. In fixing this amount the commission followed the formula approved by this court in *City of Columbus* v. *Public Utilities Commission,* 154 Ohio St., 107, 93 N. E. (2d), 693. The inclusion of $959,660 in the rate-base structure as an allowance for cash

working capital is not unlawful or unreasonable. As hereinbefore stated the amount of any accruals, which is constant and which is available with reasonable certainty in the foreseeable future and not invested in materials and supplies, should be used to offset any allowance for cash working capital.

On July 1, 1952, which is the date certain in these cases, the company had materials and supplies on hand in the total amount of $1,010,884. Of this amount, $805,870 was allocated to Ohio intrastate business. The commission allowed this entire amount, allocated to Ohio intrastate business, to be included in the company's rate-base structure.

The appellants contend that the major portion of such materials and supplies is not used for maintenance and repairs, but is used for new construction, extensions and additions, and such portion should not be included in the rate-base structure.

It is proper to include in the rate-base structure a reasonable sum to cover the company's investment in materials and supplies for the normal operations of the company and for maintenance and repair purposes. But we know of no valid reason why an allowance should be made in the rate-base structure for investments in materials and supplies for new construction, extensions and additions, as distinguished from normal operations and plant maintenance and repair. The cost of materials and supplies held for new construction, extensions and additions may be capitalized in the rate-base structure, when such materials and supplies are in actual use. Prior to such actual use such property can not be considered as being "used and useful for the service and convenience of the public," as required by Section 499-9, General Code.

Appendix E

The appellants offered evidence to show that approximately 90 per cent of the inventory of materials and supplies is, and will be, used for new construction, extensions and additions. The company's inventory and appraisement filed with the commission does not show what specific property is in the materials and supplies account, or for what it is to be used. The company's evidence on this point is to the effect that the material and supplies account does not include materials to be used to construct large additions or buildings or large private branch exchanges.

In view of this state of the record, we must conclude that the company did not submit sufficient basic evidence, as required by Section 499-9, General Code, to prove its claim that all its inventory of materials and supplies is necessary and will be used for the normal operations of the company and for ordinary maintenance and repair.

In view of our conclusions on the foregoing issues, we find it unnecessary to pass upon the other errors assigned.

The final orders of the commission, dated May 28, 1953, and August 6, 1953, are reversed, and the causes are remanded to the commission for further proceedings in accordance with this opinion.

Orders reversed.

WEYGANDT, C. J., MIDDLETON, TAFT, HART, ZIMMERMAN and STEWART, JJ., concur.

APPENDIX F

TEXT OF STATUTES INVOLVED

Title 28, United States Code, Section 1257(2):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Section 4903.12, Ohio Revised Code:

No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commisson or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court.

Section 4903.13, Ohio Revised Code:

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any

public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Section 4903.15, Ohio Revised Code:

Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission. Every order shall be served forthwith by registered mail upon the parties who have entered an appearance in the proceeding and to such other persons as the commission shall deem proper. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order.

Section 4903.16, Ohio Revised Code:

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

Appendix F

Section 4905.32, Ohio Revised Code:

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

Section 4909.17, Ohio Revised Code:

No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, and no regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the public utilities commission, by order, determines it to be just and reasonable, except as provided in this section and sections 4909.18 and 4909.19 of the Revised Code. Such sections do not apply ~~to any rate, joint rate, toll, classification, charge, or rental,~~ or any regulation or practice affecting the same, of railroads, street and electric railways, motor transportation companies, telegraph companies, and pipe line companies. Any change of any rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, of telegraph companies, may be made in the same manner as such changes may be made by railroad companies. All laws respecting such changes by railroad companies apply to such changes by telegraph companies.

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Section 4909.18, Ohio Revised Code:

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Such application shall be verified by the president or a vice-president and the secretary or treasure of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission shall permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect.

If said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A detailed inventory and appraisal of its property used and useful in rendering the service referred to in such application;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed.

Appendix F

Section 4909.19, Ohio Revised Code:

Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall f rthwith publish the substance and prayer of such application, in a form approved by the public utilities commission, once a week for three consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and affected by the matters referred to in said application, and the commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within fifteen days after the filing of such application, or within such additional time as the commission orders, a written report shall be made and filed with the commission, a copy of which shall be sent by registered mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which

may be offered by any interested party. The commission shall also fix the time and place to take testimony giving ten days' written notice of such time and place to all parties. The taking of testimony shall commence on the date fixed in said notice and shall continue from day to day until completed. The attorney examiner may, upon good cause shown, grant continuances for not more than three days, excluding Saturdays, Sundays, and holidays. The commission may grant continuances for a longer period than three days upon its order for good cause shown.

When the taking of testimony is completed, a full and complete record of such testimony noting all objections made and exceptions taken by any party or counsel, shall be made, signed by the attorney examiner, and filed with the commission. The commission shall promptly fix a date for final hearing, giving notice thereof to all interested parties, at which hearing all interested parties shall be entitled to be heard in person or by counsel, and thereafter the commission shall make such order respecting the prayer of such application as seems just and reasonable to it.

In all proceedings before the commission in which the taking of testimony is required, except when heard by the commission, attorney examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed in this section. All testimony shall be under oath or affirmation and taken down and transcribed by a reporter and made a part of the record in the case. The commission may hear the testimony or any part thereof in any case without having the same referred to an attorney examiner and may take additional testimony. Testimony shall be taken and a record made in accordance

with such general rules and regulations as the commission prescribes and subject to such special instructions in any proceedings as it, by order, directs.

APPENDIX G

JUDGMENT ENTRY IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO
City of Columbus

THE SUPREME COURT OF THE STATE OF OHIO
Of the Term of January, A. D. 1957
To-Wit: Wednesday, March 27, 1957

No. 34916

KECO INDUSTRIES, INC., et al.,
Plaintiffs-Appellees,

v.

THE CINCINNATI AND SUBURBAN BELL TELEPHONE COMPANY,
Defendants-Appellant.

APPEAL FROM THE COURT OF APPEALS OF HAMILTON COUNTY

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Hamilton County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment

that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be and it hereby is affirmed.

It is further ordered and adjudged that appellant recover from appellees its costs expended in this Court and in the Court of Appeals taxed at $.....

ORDERED, That a special mandate be sent to the Court of Common Pleas of Hamilton County, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Hamilton County, "for entry."

APPENDIX H

ENTRY DENYING APPLICATION FOR REHEARING

THE STATE OF OHIO
City of Columbus

THE SUPREME COURT OF THE STATE OF OHIO
Of the Term of January, A. D. 1957

To-Wit: Wednesday, April 17, 1957

No. 34916

KECO INDUSTRIES, INC., et al.,

Appellees,

v.

THE CINCINNATI AND SUBURBAN BELL TELEPHONE COMPANY,

Appellant.

REHEARING DOCKET

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.